86-1018

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SIGN, PICTORIAL AND DISPLAY INDUSTRY PENSION TRUST FUND;
SIGN, PICTORIAL AND DISPLAY INDUSTRY WELFARE FUND

Petitioners,

v.

FORMETRICS, INC., a corporation

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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60 pp

QUESTION PRESENTED

Whether the United States District Court has jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. § 1132 and § 1145, over an action which seeks to compel an employer to continue to make fringe benefit contributions pursuant to an expired collective bargaining agreement as long as the employer has a duty to make such contributions under applicable labor-management relations law?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. SIGN, PICTORIAL AND DISPLAY INDUSTRY PENSION TRUST FUND and SIGN, PICTORIAL AND DISPLAY INDUSTRY WELFARE FUND; and

2. FORMETRICS, INC., a corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — PAGE(S)

STATUTES

CASES — PAGE(S)

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

MISCELLANEOUS

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The Sign, Pictorial and Display Industry Pension Trust Fund and Sign, Pictorial and Display Industry Welfare Fund (herein "Trust Funds") respectfully pray that a writ of certiorari issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 9, 1986.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is not reported. The Judgment of the United States District Court (Appendix B, *infra*) is dated May 17, 1985, and is not reported.

JURISDICTION

The Order granting the motion for summary affirmance was filed September 9, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This petition is timely filed with this Court pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. National Labor Relations Act, as amended, Sections 7 and 8, 29 U.S.C. §§ 157 and 158.

B. Labor Management Relations Act of 1947, as amended, Sections 301, 302 and 303, 29 U.S.C. §§ 185, 186, and 187.

C. Employee Retirement Income Security Act of 1974, as amended, Sections 502, 515, 4201, 4203, 4212, 4221 and 4301, 29 U.S.C. §§ 1132, 1145, 1381, 1383, 1392, 1401 and 1451.

D. Multiemployer Pension Plan Amendments Act of 1980, Sections 3, 306 and 104(2), 29 U.S.C. §§ 1001a, 1132(b)(2), 1132(g)(2), 1145 and 1381-1452.

Pertinent portions of these statutory provisions are reproduced at Appendix C, *infra*.

STATEMENT OF THE CASE

The Petitioner Trust Funds are multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (herein "LMRA"), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (herein "ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (herein "MPPAA"), Pub.L.No. 96-364, 94 Stat. 1208.

On September 21, 1984, the Trust Funds filed their Complaint for money damages, bearing case number C-84-6321-SW, against Formetrics, Inc. (herein "Formetrics" or "Respondent"). The Trust Funds sought unpaid fringe benefit contributions, interest, liquidated damages, and attorneys' fees for the period of time *prior* to the termination of the collective bargaining agreement—that is, those contributions due during the period November 1, 1983 to March 31, 1984. The collective bargaining agreement here at issue was terminated as of March 31, 1984. The Complaint also sought post-contract termination fringe benefits, liquidated damages, interest and attorneys' fees from April 1, 1984 to the date of bargaining to impasse, if any.

On or about January 2, 1985, the subject Union, Sign, Display and Allied Crafts Union Local #510, AFL-CIO (herein "Union"), filed a charge with the National Labor Relations Board (herein "NLRB"), alleging a violation under Section 8 of the National Labor Relations Act. It is significant that the NLRB thereafter *declined to issue a complaint based* upon evidence that the *Union* had knowledge that the employer ceased making payments more than six (6) months prior to the filing of the charge.

Cross-motions for partial summary judgment were filed by the Petitioners and Respondent on or about April 5 and April 11, 1985, respectively. Both motions were heard on May 7, 1985 and the District Court granted both motions during a brief hearing. Petitioners were awarded the principal sum of $17,994.12 for fringe benefit contributions due for the period November 1, 1983 through March 31, 1984, plus interest at the rate of ten percent (10%) per annum in the further sum of $2,310.34, plus liquidated damages at the rate of ten percent (10%) per annum in the further sum of $1,119.03, and attorneys' fees in the further sum of $5,000. The District Court further ordered that Petitioners' claims with regard to fringe benefit contributions sought for April 1, 1984, forward, were "dismissed on the ground that the National Labor Relations Board has exclusive jurisdiction over contributions sought after the March 31, 1984 expiration of the collective bargaining agreement". Judgment was entered on May 20, 1985.

On June 13, 1985, Petitioners filed a Notice of Appeal from Part of Judgment. On June 18, 1985, Respondent filed a Notice of Cross-Appeal on the issue of attorneys' fees awarded by the Court to Petitioners. Thereafter, Respondent dismissed, by stipulation, its cross-appeal on the issue of attorneys' fees and the Ninth Circuit granted, on September 9, 1986, Respondent's Motion for Summary Affirmance of the District Court's decision.

It should be pointed out that the question presented for review in this petition is the same issue presented to this Court by way of a similar petition in *Laborers Health & Welfare Trust Fund for Northern California, et al* v. *Advanced Lightweight Concrete Co., Inc.*, No. 85-2079. On October 6, 1986, this Court entered an Order inviting the Solicitor General to file a brief in the matter expressing the views of the United States. It is respectfully requested that this case be joined with *Advanced Lightweight Concrete* for consideration and argument.

The Ninth Circuit has held, in both these cases, that the primary jurisdiction of the NLRB pre-empts a trust fund's suit in District Court under Sections 502 and 515 of ERISA, as amended, 29 U.S.C. §§ 1132 and 1145, to recover delinquent fringe benefit contributions accrued and owing after a collective bargaining agreement has expired. *Laborers Health & Welfare Trust Fund for Northern California, et al* v. *Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497, 498 (9th Cir. 1985). The Ninth Circuit, in this case, has reiterated the rule that, following expiration of a collective bargaining agreement and during the period that an employer has a duty to bargain in good faith with the union that represents its employees, an employer is obligated to continue making fringe benefit contributions pursuant to the terms of the expired collective bargaining agreement, until the employer negotiates in good faith with the union and reaches either a new collective bargaining agreement or impasse. Failure to make such contributions is an unfair labor practice in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act, as amended (herein "NLRA"), 29 U.S.C. §§ 158(a)(1), 158(a)(5) and 158(d). *See, NLRB* v. *Southwest Security Equipment*

Corporation, 736 F.2d 1332, 1337 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1854 (1985); *Peerless Roofing Co. Ltd.* v. *NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Clear Pine Mouldings, Inc.* v. *NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *Producers Dairy Delivery Co., Inc.* v. *Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *Hinson* v. *NLRB*, 428 F.2d 133 (8th Cir. 1970). *See also, NLRB* v. *Katz*, 369 U.S. 736, 743 (1962).

Because the Ninth Circuit found "no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse" (779 F.2d at 505), the Ninth Circuit decided the matter by the application of what it termed an "accepted labor law principle": "When presented with a dispute that involves adjudicating conduct which 'is arguably within the compass of § 7 or § 8 of the NLRA,' a federal court must defer to the primary jurisdiction of the NLRB. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959)." *Id.* at 504. The Ninth Circuit reasoned as follows:

> .... Advanced's failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice. While admittedly the failure to pay may also violate section 515 of ERISA, adjudication of the merits depends entirely on the section 8(a)(5) determination. Without a section 8(a)(5) violation, there is no section 515 infraction. Making this underlying labor law determination is exclusively an NLRB matter [footnote omitted]. *Id.*[1]

Finally, while the Ninth Circuit in *Advanced Lightweight Concrete* has indicated that there was no bar to the filing of an

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[1] The Third and Fifth Circuits and another panel of the Ninth Circuit have all recently reached the same result in similar cases. *Moldovan* v. *Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds* v. *Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund* v. *Laborers Funds Administrative Office*, 783 F.2d 919 (9th Cir. 1986). The Fifth and Ninth Circuits cited *Advanced Lightweight Concrete*.

unfair labor practice charge against the employer, 779 F.2d at 503, that is not the situation that exists in this case. The NLRB has already declined to issue a complaint filed by the Union representing the employees in this matter, based upon evidence that the Union had knowledge that the employer ceased making payments more than six (6) months prior to the filing of the charge. Accordingly, unless the United States District Court has jurisdiction, there is no forum in which the Trust Funds may exercise the rights given to them by ERISA, as amended by the MPPAA, and under the NLRA.

REASONS FOR GRANTING THE WRIT

The issue raised in this appeal is of great significance to all trust funds covered by ERISA and to the hundreds of thousands of employees and their dependents who are members of these trust funds. These trust funds and the member employees and their dependents are third party beneficiaries of the union collective bargaining agreements. *E.g., Wishick* v. *One Stop Food & Liquor Store,* 359 F.Supp. 239 (N.D.Ill. 1973). Indeed, after the expiration of a collective bargaining agreement, employees continue to work during the negotiations and expect to receive fringe benefit coverage. Not infrequently, these negotiations may continue for months or even years. In *Carter* v. *CMTA-Molders & Allied Health and Welfare Trust,* 736 F.2d 1310 (9th Cir. 1984), the parties did not reach impasse for five-and-one-half (5½) years. When an employer ceases making fringe benefit contributions, a readily available, certain and meaningful federal court remedy is not only envisioned by the comprehensive statutory scheme of ERISA, but absolutely necessary if the trustees, in the discharge of their fiduciary duty to maintain the actuarial soundness of their trust funds, are to have an effective avenue of redress. *Laborers Health and Welfare Trust Fund* v. *Kaufman & Broad,* 707 F.2d 412, 416 (9th Cir. 1983). In this case, however, the NLRB has already refused to issue a complaint, so there is no avenue of redress open to these trustees should this Court continue to deny jurisdiction.

The Ninth Circuit has ruled that trustees must delegate their fiduciary duty to collect delinquent contributions to the NLRB. Accordingly, consideration of this matter by this Court is essential.

I

ERISA, As Amended By MPPAA, Encompasses Suits By Multiemployer Employee Benefit Plans To Collect Post-Contract Expiration Fringe Benefits.

Both Trust Funds were created by a written trust agreement pursuant to Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). Prior to 1974, jurisdiction of the United States District Court of suits for delinquent fringe benefit contributions was predicated exclusively on Section 301 of the LMRA, 29 U.S.C. § 185. *E.g., Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960). In 1974, Congress enacted ERISA and, later, the MPPAA, which amended ERISA in 1980. From that point forward, the jurisdictional ground rules changed.

The legislative history of the MPPAA shows that Congress was concerned about the financial health of trust funds and that Congress identified employers' delinquent contributions as a principal cause of the problem. During its consideration of the proposed Section 515 of ERISA, the Senate Committee on Labor and Human Resources explains these concerns as follows:

> *Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans.* Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and *adversely affect the financial health of plans. Participants and beneficiaries* of plans as

> well as employers who honor their obligation to contribute in a timely fashion *bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates.* Moreover, in the context of this legislation, *uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.*
>
> * * *
>
> The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to *discourage delinquencies and simplify delinquency collection . . . . The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.* Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., 43-44 (unnumbered Comm. Print 1980) (emphasis added)

It is apparent, from a review of the legislative history of Section 515, that the paramount concern of Congress was to expedite and simplify the collection of delinquent contributions in order to secure the financial integrity of the trust funds.

Congress also recognized that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. Section 306(a) of MPPAA added Section 515 to ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The language of Section 515 of ERISA offers a clear indication of Congress' intent to require strict observance of the "*terms* of a collectively bargained agreement" where those terms provide that the "employer . . . is obligated to make contributions to a multiemployer plan" unless observing the

terms of the agreement is "inconsistent with law." Section 306(b)(2) of MPPAA added Section 502(g)(2) to ERISA, 29 U.S.C. § 1132(g)(2), which provides for mandatory awards of interest, liquidated damages, and attorneys' fees to multi-employer plans when judgment is entered in their favor in an action to enforce Section 515 of ERISA.

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) also affords a basis for District Court jurisdiction over violations of Section 515. Chief District Judge Robert Peckham (Northern District of California) has thoughtfully and thoroughly discussed this argument in *Laborers Health & Welfare Trust Fund* v. *Hess,* 594 F.Supp 273 (N.D.Cal. 1984). It is respectfully submitted that the rationale expressed by Judge Peckham in *Hess* should be followed as the analysis in that case is thoughtful, sound and correct Rather than re-state Judge Peckham's analysis, suffice it to say that he did not construe Sections 502 or 515 of ERISA as granting exclusive jurisdiction to the NLRB. Rather, Judge Peckham stated that:

> [T]he court's interpretation of section 515 represents but a minor inroad on the NLRB's primary jurisdiction over unfair labor practice issues. The scope of section 515 is narrow, applying only to actions to collect trust fund contributions. Further, if the same unfair labor practice question arises in both an NLRB proceeding and a suit in federal district court, "[a]ppropriate deference to the jurisdiction and expertise of the agency will often require a stay of judicial proceedings." *Northern California District of Hod Carriers, Bldg. & Construction Laborers, AFL-CIO* v. *Opinski,* 673 F.2d 1074, 1075 (9th Cir. 1982); *see also Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County* v. *Celotex Corp.,* 708 F.2d 488, 490 n. 3 (9th Cir. 1983). Thus, in the context of section 515, the *interest in directing unfair labor practice issues to the NLRB is not sufficiently compelling to convince this court to diverge from what it perceives as the clear implication of section 515's language and legislative history.* The court therefore holds that *it has jurisdiction* over the instant case pursuant to sections 502 and 515 of ERISA. *Id.* at 282 (footnote omitted) (emphasis added)

The decision in *Hess* is consistent with this Court's opinion in *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975). In *Connell,* this Court reiterated its holding in other cases that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." *Id.* at 626. This Court noted in *Connell* that "[i]n most cases a decision that state law is pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. [citations omitted.] But in cases like this one, whether there is an independent federal remedy that is consistent with the NLRA, parties may have a choice of federal remedies. [citations omitted.]" *Id.* at 635 n. 17.

The Ninth Circuit's ruling would require that, in situations like the one before this Court, the Trust Funds would need to file *two separate proceedings,* one in District Court for fringe benefit contributions due through the date of the expiration of the collective bargaining agreement and a second, *separate* charge with the NLRB. It is difficult to believe that this is what Congress had in mind when it enacted ERISA. Indeed, Representative Thompson and Senator Williams explained the purpose of Section 515 as follows:

> Recourse available under current law for collecting delinquent contributions is insufficient and *unnecessarily costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation* concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit *trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law* (other than 29 U.S.C. 186). Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises . . . . [T]his legislation is intended to clarify the law . . . by *providing a direct, unambiguous ERISA cause of action to a plan against a*

delinquent employer. 126 Cong.Rec. 23039 (1980) (remarks of Rep. Thompson); *Id.* at 23288 (remarks of Sen. Williams). (emphasis added)

In the situation before this Court, there is no possibility that the Trustees can proceed by way of the NLRB as was the case in Advanced Lightweight Concrete.

In addition to addressing the problem of delinquent contributions, the MPPAA, *inter alia,* added to ERISA provisions for the assessment of withdrawal liability upon employers that completely or partially terminate their participation in multiemployer defined benefit pension plans under certain circumstances. MPPAA, § 104(2), 29 U.S.C. §§ 1381-1405. Congress has expressly provided in the MPPAA that the NLRB is *not* the exclusive forum for determining whether or not an employer has a post-contract expiration obligation pursuant to the NLRA to continue making contributions to a multiemployer pension plan. An employer that permanently ceases to have an "obligation to contribute" may be assessed withdrawal liability. ERISA, § 4203, as added by MPPAA, § 104(2), 29 U.S.C. § 1383. This definition of "obligation to contribute" imposes a duty that is also imposed by the NLRA. As a result, in determining whether an employer has withdrawn from a multiemployer pension plan and, accordingly, has withdrawal liability, it must be decided whether or not the employer continues to be obligated under the NLRA to contribute. The NLRB does not make this decision under the MPPAA. The trustees of the plan make this decision in the first instance [ERISA, § 4219, as added by MPPAA, § 104(2), 29 U.S.C. § 1399], then, if necessary, an arbitrator [ERISA, § 4221(a), as added by MPPAA, § 104(2), 29 U.S.C. § 1401(a)], and ultimately, if necessary, a federal district court [ERISA, § 4221(b), as added by MPPAA § 104(2), 29 U.S.C. § 1401(b); ERISA § 4301, as added by MPPAA § 104(2), 29 U.S.C. § 1451].

Thus, the withdrawal liability provisions of the MPPAA have already encroached, arguably, upon the NLRB's jurisdiction. Since the United States District Courts must decide in the context of withdrawal liability litigation when the contribution obligation imposed by the NLRA ceases, it is no burden upon

federal labor policy for the courts to also decide the same issue in the context of contribution delinquency litigation pursuant to Section 515 of ERISA. This is the same rationale used by Chief Judge Peckham in the *Hess* decision.

Contrary to *Hess* and the position of the Trust Funds, the Ninth Circuit concluded in *Advanced Lightweight Concrete* that the obligation to pay the contributions required by Section 515 or ERISA must arise under an extant agreement [as opposed to a statute such as Section 8(a)(5) of the NLRA] in order to create District Court jurisdiction. The only explanation that the Ninth Circuit gave for its refusal to adopt the definition of "obligation to contribute" contained in the withdrawal liability provisions of ERISA was the conclusory statement that "a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than employer's general liability for ERISA violations." 779 F.2d at 502. The Ninth Circuit offered no reason why Congress would want to create a discontinuity between the withdrawal liability part of ERISA and the other contexts in which the question of obligation to contribute might arise. *See, I.A.M. National Pension Fund* v. *Schulze Tool and Die Co., Inc.*, 564 F.Supp. 1285, 1294 n.4 (N.D.Cal. 1983); *Hess*, 594 F.Supp. at 279 n.7. It makes little sense that Congress would have intended such a discontinuity.

The construction of Section 515 by the court below makes the jurisdictional scope of Section 515 no different from that of Section 301 of the LMRA with respect to the collection of delinquent contributions.[2] As a result, Section 515, as construed by the Ninth Circuit, adds nothing to Title 29 of the United States Code. This result is contrary to both the established rules of statutory construction and Congress' desire in enacting Section 515 to facilitate the collection of delinquent contributions in order to protect the financial integrity of the multiemployer employee benefit plans upon which so many working people rely.

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[2] In *Cement Masons Health and Welfare Trust Fund* v. *Kirkwood-Bly, Inc.*, 520 F.Supp. 942 (N.D.Cal. 1981), *aff'd for the reasons stated in the district court's opinion*, 692 F.2d 641 (9th Cir. 1982), the district court held that there was no jurisdiction under Section 301 of the LMRA over a suit to collect unpaid fringe benefit contributions owing to an employee benefit plan for the period after the expiration of the collective bargaining agreement.

> "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . (footnotes omitted)." Sutherland, *Statutory Construction*, § 46.06 (4th Ed.) at 104.

"Where different words are used in different parts of a statute, they are presumed to have different meanings." *Id.* at 108 n.1. Section 515 contains language which is entirely different from that of Section 301. Nevertheless, the Ninth Circuit's reading of Section 515 has made the jurisdictional breadth of Section 515 and Section 301 exactly the same with respect to the collection of delinquent contributions. As a result, the decision below ignores the statutory construction maxim that the legislature does not enact superfluous, repetitive legislation.

The Ninth Circuit commits the same errors when it adopts the reasoning of the district court in *Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F.Supp. 1441 (W.D.Mo. 1985): "[a]s *Botsford* properly observes, there is no reason to believe that Congress would use 'an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act.' 605 F.Supp. at 1445." 779 F.2d at 502. Also following *Botsford*, the Ninth Circuit pointed to what it claimed to be "the similarity between the phraseology in section 515 and that in section 1392(a)(1) ('obligation to contribute arising . . . under one or more collective bargaining . . . agreements')" in order to "reinforce the conclusion that Congress intended section 515 liability to be less extensive than withdrawal liability." *Id.* By adopting the *Botsford* approach, the Ninth Circuit failed to recognize, in stressing the similarity between the two sections, the *difference*: when Congress meant to say "under one or more collective bargaining agreements" and thereby limit the definition of "obligation to contribute" to obligations arising under an extant agreement. Congress knew perfectly well how to do so and did just that in 29 U.S.C. § 1392(a)(1). Congress' use of the phrase "obligated to make

contributions to a multiemployer plan *under the terms*" of a collective bargaining agreement in 29 U.S.C. § 1145, which is different language from that found in 29 U.S.C. § 1392(a)(1), establishes the Congressional intent to have two different meanings. Section 515 specifically requires an employer to make contributions where the employer is obligated to do so "under the terms of the plan or under the terms of a collectively bargained agreement," which includes the situation where the terms of the plan or agreement have been extended by operation of law [for example, Section 8(a)(5) of the NLRA].

For the foregoing reasons, it is submitted that the policies, language, legislative history and the comprehensive statutory scheme of ERISA, as amended by the MPPAA and the statutory rules of construction, all compel the conclusion that the United States District Court does have jurisdiction, pursuant to Sections 502 and 515 of ERISA, over suits to collect fringe benefit contributions due and owing pursuant to an expired collective bargaining agreement.

II

The National Labor Relations Board Is Not An Adequate Avenue Of Redress For Multiemployer Employee Benefit Plans.

As pointed out previously, it appears as though these Trust Funds do not have recourse by way of the National Labor Relations Board, which makes this case significantly different from *Advanced Lightweight Concrete*. It is important to point out, in any event, that the NLRB is simply *not an alternative forum* in which to litigate the issue of post-contract expiration fringe benefit contributions. There are several major differences between actions the Trustees could bring in District Court and the remedies available before the NLRB. The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of Trust Funds to collect delinquent contributions.

First, the NLRB declines to exercise jurisdiction over non-retail enterprises where the gross inflow or outflow of goods affecting interstate commerce is less than $50,000. *See, Culligan Soft Water Service*, 149 NLRB 2 (1964).

Second, the NLRB will not remedy any conduct occurring more than six (6) months prior to the filing of an unfair labor practice charge with the NLRB. *See* Section 10(b) of the NLRA, 29 U.S.C. § 160(b). By contrast, a federal court action under ERISA to collect delinquent contributions is governed by the most applicable statute of limitations of the forum state. *Cf., Waggoner* v. *Dallaire*, 649 F.2d 1362 (9th Cir. 1981). In California, the statute of limitations for actions for breach of a statutory duty is three years. Cal.Civ.Proc. Code § 338. Trust funds rely on the self-reporting of employers or on audits of the employer's payroll and personnel records to determine whether contributions are due. A six-month limitation, while arguably appropriate where a union or employer will have first-hand knowledge of the actions constituting an unfair labor practice, would be a profound and severe restriction on trust funds, which ordinarily do not have an on-going day-to-day working relationship with an employer.

This short, six-month statute of limitations within which to file a charge with the NLRB would, in all likelihood, result in *a substantial increase in NLRB charges* as the only way to protect the position of the trust funds would be to file a charge as soon as the trust fund learned that a union collective bargaining agreement had been terminated. Rather than give the union and employer a chance to negotiate a new collective bargaining agreement, as envisioned in the federal labor law, the *Advanced Lightweight Concrete* decision will have the unfortunate result of increasing the number of NLRB charges filed. This assumes, however, that the Trust Funds will first learn, in a timely (six-month) fashion that a *union* contract has been terminated by an employer. In addition, and of great significance, it is submitted that a Trust Fund will have a difficult time determining whether to file an unfair labor practice charge with the NLRB because an employer is refusing to pay contributions or, in the alternative, whether a particular employer is simply late with monthly payments—as is often the case. The Trust Funds

will not, however, have the luxury of waiting to make that determination under the ruling of *Advanced Lightweight Concrete*.

Third, even should the Trust Funds prevail in a proceeding before the NLRB, they will *not* receive liquidated damages and attorneys' fees that would be awarded by a United States District Court pursuant to 29 U.S.C. § 1132(g)(2). Even though this relief may not be obtained before the NLRB, the Trust Funds will continue to remain liable for pension benefits for hours worked by employees for which no contributions were made. *See Central States, Southeast and Southwest Areas Pension Fund* v. *Hitchings Trucking, Inc.*, 472 F.Supp. 1243 (E.D.Mich. 1979); *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. ____, 86 L.Ed.2d 447, 455 n. 7, 463 n. 20 (1985); *Central States, Southeast and Southwest Areas Pension Fund* v. *McNamara Motor Express*, 503 F.Supp. 96 (W.D.Mich. 1980); 29 C.F.R. § 2530.200b-2.

Despite the express Congressional desire in enacting Section 515 to expedite and simplify the collection of delinquent contributions, the Trust Funds will, as a result of *Advanced Lightweight Concrete*, be required to meet the financial burden of ERISA's guarantees in the form of pension payments without being assured of corresponding contributions by employers to the Trust Funds. It is submitted that Trust Funds should be afforded the opportunity to seek redress in the United States District Court. To hold otherwise would compromise the actuarial soundness of the these Trust Funds and obstruct the Trustees in their performance of the fiduciary obligations imposed upon them by ERISA.

Fourth, the investigation, issuance of complaint, prosecution and enforcement of the unfair labor practice is entirely within the control of the General Counsel of the NLRB. *See* 29 U.S.C. § 153(d); 29 C.F.R. §§ 101.2, 101.4, 102, *et seq.*. Trust Funds would have no control over the decision to issue the complaint, or the discovery, time and tactical and strategic decisions involved. They would, in short, be at the mercy of the General Counsel who, unlike the trust funds, is under no

fiduciary responsibility and whose discretion in exercising jurisdiction over unfair labor practices is subject to very few limitations. *See, e.g., Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967); *Baker* v. *International Alliance of Theatrical Stage Employees,* 691 F.2d 1291, 1297 (9th Cir. 1982). In addition, unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the charged party despite objections by the charging party. *See* 29 C.F.R. § 101.9(c); *Botsford, supra,* 605 F.Supp. 1441, 1444.

Finally, NLRB negotiated settlements may compromise contribution obligations in exchange for employer concessions in other areas. *Id.* (settlement in an amount equal to 80% of the contributions that should have been paid).

The foregoing makes it clear that the NLRB is not an alternative method of seeking fringe benefit contributions and related damages. In situations where the NLRB, for whatever reason, refuses to prosecute, Trust Funds will have *no available forum, as is the case in this matter, in which to collect post-contract expiration fringe benefits.*

III

Recognition Of An Independent Federal Remedy Pursuant To Section 515 Of ERISA Is Consistent With The NLRB Pre-emption Doctrine Developed By The Supreme Court And The Ninth Circuit.

In *Advanced Lightweight Concrete,* the Ninth Circuit literally and mechanically applied the *Garmon* doctrine and held that the NLRB is the proper, and only, forum. However, the Supreme Court has often stated that "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion." *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180, 188 (1978); *Operating Engineers* v. *Jones,* 460 U.S. 669, 676 (1983). Since the Supreme Court initially set forth the *Garmon* doctrine in 1959, *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), it has recognized numerous exceptions to NLRB pre-emption. For example, "[t]his pre-emption doctrine . . . has never been rigidly applied to cases where it could not fairly

be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca, supra,* 386 U.S. at 179. Supreme Court has also "refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' [citations omitted]" *Farmer* v. *United Brotherhood of Carpenters,* 430 U.S. 290, 297 (1977). In addition, the Supreme Court has pointed out that "the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca, supra,* 386 U.S. at 180.

Consistent with the foregoing principles, the Supreme Court and the Ninth Circuit have both recognized that, "where there is an independent federal remedy that is consistent with the NLRA, the parties may have a *choice of federal remedies." Connell, supra,* 421 U.S. at 635 n. 17; *California State Council of Carpenters* v. *Associated General Contractors,* 648 F.2d 527, 532 n. 6 (9th Cir. 1980), *rev'd in part on other grounds,* 459 U.S. 519 (1983).

In *Advanced Lightweight Concrete,* the Court mechanically applied the *Garmon* doctrine and incorrectly concluded that the underlying labor law determination is exclusively an NLRB matter. Supreme Court precedent indicates that rigid application of the *Garmon* doctrine is to be avoided, especially "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB". *Vaca, supra,* 386 U.S. at 179. *See also, Farmer, supra,* 430 U.S. at 302. In this case, it cannot fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. Initially, the MPPAA was passed in 1980, well after the Supreme Court's decision in *Connell* in 1975, which recognized that "where there is an independent federal remedy that is consistent with the National Labor Relations Act, the parties may have a choice of federal remedies". *Connell, supra* at 635 n. 17.

Second, and of great importance, nowhere does ERISA, as amended, *require* that any action under its provisions be taken before the NLRB.

Third, the "underlying labor law determination" referred to in *Advanced Lightweight Concrete* which the Court claims "is exclusively an NLRB matter", has been and will continue to be *decided regularly by federal courts pursuant to ERISA* in deciding, for example, *withdrawal liability litigation.* Accordingly, in withdrawal liability lawsuits brought pursuant to ERISA, federal courts must make precisely the same determinations as they would have to make in the instant case. Consequently, the *Advanced Lightweight Concrete* decision which holds that these underlying labor law determinations are *exclusively* an NLRB matter, simply flies in the face of reality.

Permitting these Trust Funds to seek judicial relief pursuant to Section 515 of ERISA will not interfere with the interests promoted by the federal labor law statutes or interfere with general NLRB enforcement. Recognition of an independent federal remedy pursuant to Section 515, as Judge Peckham noted in the *Hess* case, is entirely proper since the remedy is consistent with ERISA, the National Labor Relations Act, and both the Supreme Court and Ninth Circuit, which permits a choice of federal remedies in such cases.

The recent case of *John S. Griffith Construction Co.* v. *United Brotherhood of Carpenters & Joiners of Southern California,* 785 F.2d 706 (9th Cir. 1986) provides a thoughtful analysis of the primary jurisdiction doctrine and involves a situation in which the NLRB had initial responsibility but refused, for its own "cryptic" reasons, to take any action. That is precisely the situation that is presently before this Court. The Court's language in *Griffith* is instructive:

> The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board. *But that rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board.* (emphasis added) *Id.* at 710.

Likewise, in this situation, the Board has already refused to take any action, even though requested to do so previously by the Union. As in *Griffith,* when a party " . . . has 'no adequate means of obtaining an evaluation . . . by the NLRB', a court must reconsider any rote application of the [preemption] doctrine." *Id.* at 710, *quoting International Longshoremen's Ass'n, Local 1416* v. *Ariadne Shipping Co.,* 397 U.S. 195, 201 (1970) (White, J., concurring).

The case in the Fifth Circuit, which is similar to *Advanced Lightweight Concrete, U.A. 198 Health & Welfare, Education & Pension Funds* v. *Rester Refrigeration Service,* 790 F.2d 423 (5th Cir. 1986), is also instructive on the issue of primary jurisdiction and the *Garmon* doctrine. *Rester Refrigeration Service* points out, at 790 F.2d 424, n. 1:

> The precise function of the doctrine of primary jurisdiction is to guide a court in determining whether the court should refrain from exercising its jurisdiction until after an administrative agency has determined some question or some aspect of some question arising in the proceeding before the court.
>
> The doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue. [*citing,* Davis, *Administrative Law Treatise,* 19.01, p. 3 (1958)]
>
> While the considerations underlying Garmon are similar to those underlying the primary-jurisdiction doctrine, the consequences of the two doctrines are therefore different. Where applicable, the Garmon doctrine completely pre-empts state-court jurisdiction unless the Board determines that the disputed conduct is neither protected nor prohibited by the federal Act. *Sears, Roebuck & Co.* v. *Carpenters,* 436 U.S. 180, 199, n. 29 (1978). (emphasis in original)

For the foregoing reasons, it is submitted that the United States District Court does have jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

RUBENSTEIN, BOHACHEK & JOHNS
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December 1986

APPENDIX A

FILED
SEP 9 1986
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIGN, PICTORIAL AND DISPLAY INDUSTRY PENSION TRUST FUND, AND SIGN, PICTORIAL, AND DISPLAY INDUSTRY WELFARE FUND,

Plaintiffs-Appellants,

vs.

FORMETRICS, INC., a corporation,

Defendant-Appellee.

No. 85-2160
DC# CV-84-6321-SW
Northern California
ORDER

Before: WRIGHT, WALLACE and SCHROEDER, Circuit Judges

Appellee's motion for summary affirmance of the district court's decision is granted. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497, 498 (9th Cir. 1985); *see also Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office of Northern California, Inc.*, 783 F.2d 919 (9th Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigerator Service*, 790 F.2d 423 (5th Cir. 1986).

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIGN, PICTORIAL AND DISPLAY INDUSTRY PENSION TRUST FUND; SIGN, PICTORIAL AND DISPLAY INDUSTRY WELFARE FUND,

Plaintiffs-Appellants,

vs.

FORMETRICS, INC., a corp.,

Defendant-Appellee.

No. 85-2160
DC CV 84-6321 SW

APPEAL from the United States District Court for the Northern District of California.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the appeal for summary affirmance in this Cause be, and hereby is granted.

Filed and entered September 9, 1986

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK

WILLIAM L. WHITTAKER
CLERK

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIF. 94102
(415) 556-3031

November 14, 1986

CASE NUMBER: C-84-6321-SW

CASE TITLE: SIGN PICTORIAL AND DISPLAY et al. v. FORMETRICS

DATE MANDATE FILED: 11/14/86

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Yours Very Truly,

WILLIAM L. WHITTAKER, Clerk

/s/ KEELY KIRKPATRICK
Case Systems Administrator

Criminal—Counsel of Record
U.S. Marshal (Copy of Mandate)
U.S. Probation Office

APPENDIX B

PILLSBURY, MADISON & SUTRO
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Attorneys for Defendant, Formetrics, Inc.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIGN, PICTORIAL AND DISPLAY INDUSTRY PENSION TRUST FUND; SIGN, PICTORIAL AND DISPLAY INDUSTRY WELFARE FUND,

Plaintiffs,

vs.

FORMETRICS, INC., a Corporation,

Defendant.

No. C-84-6321 S.W.
CIVIL JUDGMENT

ENTERED IN CIVIL DOCKET MAY 20, 1985

In conformity with cross-motions for partial summary judgment filed by plaintiffs and defendant, which were granted

JUDGMENT

in open court on May 7, 1985, the Court hereby enters the following Judgment:

It is hereby ORDERED, ADJUDGED and DECREED, that plaintiffs Sign, Pictorial and Display Industry Pension Trust and Sign, Pictorial and Display Industry Welfare Fund have Judgment against defendant Formetrics, Inc., a corporation, in the principal sum of $17,994.12, as and for fringe benefit contributions due and owing during the period November 1, 1983 through March 31, 1984 (representing contributions for the months of November and December 1983 and January 1984) plus interest at the rate of ten percent (10%) per annum in the further sum of $2,310.34, plus liquidated damages at the rate of ten percent (10%) per annum in the further sum of $1,119.03, and attorneys' fees in the further sum of $5,000.

It is hereby FURTHER ORDERED, ADJUDGED and DECREED, that plaintiffs' claims with regard to the fringe benefit contributions sought for April 1, 1984 forward are dismissed on the ground that the National Labor Relations Board has exclusive jurisdiction over contributions sought after the March 31, 1984 expiration of the collective bargaining agreement.

Dated: May 17, 1985.

/s/ SPENCER WILLIAMS

Spencer Williams
Judge of the United States District Court

APPROVED AS TO FORM:

/s/ EARL L. BOHACHEK

Rubenstein & Bohachek
Attorneys for Plaintiff

/s/ ANNE E. LIBBIN

Pillsbury, Madison & Sutro
Attorneys for Defendant

ORDER

APPENDIX C

STATUTES INVOLVED

A. National Labor Relations Act, As Amended

Section 7 of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in relevant part:

> (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents--

....

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular

work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual

employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

....

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State of Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of

a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to

enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber

> or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception...

B. Labor Management Relations Act of 1947, As Amended

Section 301(a) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 302 of the LMRA, 29 U.S.C. § 186, provides in relevant part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged

in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [footnote omitted]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable...(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

> the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities...

Section 303 of the LMRA, 29 U.S.C. § 187, provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

C. Employee Retirement Income Security Act of 1974, As Amended

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA" 29 U.S.C. § 1132(a)(3), provides:

A civil action may be brought...

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

> subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 502(b)(2) of ERISA, as added by Section 306(b)(1) of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), 29 U.S.C. § 1132(b)(2), provides:

> The Secretary shall not intitiate an action to enforce section 1145 of this title.

Section 502(f) of ERISA, 29 U.S.C. § 1132(f), provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Section 502(g)(2) of ERISA, as added by Section 306(b)(2) of the MPPAA, 29 U.S.C. § 1132(g)(2), provides:

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--
(i) interest on the unpaid contributions, or
(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Section 515 of ERISA, as added by Section 306(a) of the MPPAA, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 4201(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1381(a), provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4203 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1383, provides in relevant part:

> (a) For purposes of this part, a complete withdrawal from a

multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b)(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if--

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan--
(i) primarily covers employees in the building and construction industry, or
(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if--

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer--
(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

....

(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

Section 4212(a) of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1392(a), provides:

> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--
>
> (1) under one or more collective bargaining (or related) agreements, or
> (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4221 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1401, provides in relevant part:

> (b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.
>
> (2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the

> issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.
>
> ....
>
> (d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

Section 4301 of ERISA, as added by Section 104(2) of the MPPAA, 29 U.S.C. § 1451, provides in relevant part:

> (b) In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment

within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdction over an action brought by a plan fiduciary to collect withdrawal liability.

D. Multiemployer Pension Plan Amendments Act of 1980

Section 3 of the MPPAA, 29 U.S.C. § 1001a, provides:

(a) The Congress finds that--

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that--

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will

> enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.
>
> (c) It is hereby declared to be the policy of the Act--
>
> (1) to foster and facilitate interstate commerce,
>
> (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,
>
> (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and
>
> (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

The other pertinent portions of the MPPAA added sections to ERISA and are reproduced supra with the appropriate section of ERISA.